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No. 06-736

IN THE

Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

STATE OF NEW YORK, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

THE UTILITY AIR REGULATORY GROUP'S RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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DISCLOSURE STATEMENT

The Utility Air Regulatory Group ("UARG") is a non-profit, unincorporated organization of individual electric utilities and national trade associations. UARG has no outstanding shares or debt securities in the hands of the public and does not have any parent, subsidiary or affiliate that has issued shares or debt securities to the public.

RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 12.6, the Utility Air Regulatory Group ("UARG"), an intervenor-respondent below, respectfully submits this response in support of the petition for a writ of certiorari of the United States Environmental Protection Agency ("EPA") in *EPA v. State of New York*, No. 06-736. EPA seeks review of the decision of the United States Court of Appeals for the District of Columbia Circuit in *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006) ("*New York II*"). This response is being submitted within 20 days of EPA's petition having been docketed on November 27, 2006.

REASONS FOR SUPPORTING EPA'S PETITION

On November 27, 2006, UARG filed a petition for a writ of certiorari seeking review of *New York II* on much the same terms as EPA. *See UARG v. State of New York*, No. 06-750 (docketed November 29, 2006). In its petition, EPA questions whether the D.C. Circuit "erred in invalidating" the Equipment Replacement Provision ("ERP") rule on the "ground that the phrase 'any physical change' in the definition of 'modification' in" Clean Air Act ("CAA") § 111(a)(4) "unambiguously requires EPA to adopt the broadest meaning of the phrase." EPA Petition at (I). For its part, UARG questions whether the court's "reliance on a fragment of the 40-word statutory definition of 'modification' to find a clear expression of congressional intent" conflicts with this Court's *Chevron* decision. UARG Petition at i.

In support of certiorari on this issue, EPA observes that, in striking down the ERP rule, the D.C. Circuit has "announced a sweeping rule of construction" that would "operate to deprive administrative agencies of discretion to construe ambiguous statutory terms whenever those terms are preceded by the word 'any'." EPA Petition at 9. This holding, EPA points out, "is inconsistent" with this Court's "repeated admonitions

that statutes must be construed in context and as a whole," as well as with this Court's decision in *Chevron*. *Id.* at 9-10. As EPA notes, *Chevron* "involved the same statute and the same definitional section at issue here." *Id.* at 14.[1]

UARG agrees, noting in its petition that under the "new formulation of *Chevron*" presented in *New York II*, "specific meaning is given to fragments of statutory language in order to find an unambiguous congressional 'intent'" that could not be found if "traditional canons of statutory construction were applied to the statutory provision as a whole." UARG Petition at 3. Excising three words – *i.e.*, "any physical change" – from the statutory definition, UARG continues, runs afoul of the well-settled principle that a reviewing court "should not confine itself to examining a particular statutory provision in isolation." *Id.* at 14-15, *quoting FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). For these reasons, UARG supports granting EPA's petition, to address the conflict between *New York II* and this Court's decision in *Chevron*.

UARG's petition also presents a second question: whether EPA "has discretion under the CAA to adopt a rule that excludes" from . . . NSR a "subset of projects" that are not "modifications" under the New Source Performance Standards ("NSPS") program, as that term "modification" has been "defined and used under the CAA for the past 35 years." UARG Petition at i EPA's petition encompasses and provides compelling support for granting certiorari to address this issue as well.

First, EPA points out that *New York II* conflicts with the established presumption that "Congress . . . legislate[s] with awareness of prior administrative regulations," and that when

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[1] *See also* UARG Petition at 20 (noting this Court's explanation of "modification" and "major modification" as distinct concepts: under the New Source Review ("NSR") rules, a source "may . . . modify one piece of equipment without meeting [NSR] . . . if the alteration will not increase total emissions from the plant," *i.e.*, if it is not a "major modification.").

Congress "elects to use statutory language that has already been given an interpretive gloss by the administering agency," it should "ordinarily be presumed to intend to allow the agency to continue to employ that regulatory gloss." EPA Petition at 16, *citing TWA v. Hardison*, 432 U.S. 63, 76 n.11 (1977); *Young v. Community Nutrition Inst.*, 476 U.S. 974, 983 (1986). This "inference of congressional approval is fully applicable here," EPA continues, given that, when "Congress enacted the statutory NSR program in 1977," and "cross-referenc[ed] the pre-existing NSPS statutory definition of 'modification,'" Congress "acted in a context in which EPA had already interpreted that key provision." *Id.* EPA faults the D.C. Circuit for "disregard[ing] the fact" that Congress had accepted this "prior [NSPS] regulatory construction[]" of the term "modification." *Id.* at 19. Indeed, as UARG observes, it would be a "particularly odd approach to statutory interpretation to conclude that, by defining 'modification' for NSR to mean 'modification' as defined in NSPS," Congress "intended to *preclude* EPA from implementing CAA § 111(a)(4) for NSR the same way it had always implemented that provision for NSPS." UARG Petition at 17 (emphasis in original).

Moreover, as EPA explained in its petition, "[t]he regulations that EPA promulgated in 1974 to implement the original regulatory" Prevention of Significant Deterioration ("PSD") program "defined 'modification' [in 40 C.F.R. § 52.01(d)] in largely the same way as it was defined for the existing NSPS." EPA Petition at 4; *see also* UARG Petition at 6-8. Both EPA and UARG point out that, in the 1977 CAA Amendments, Congress specifically provided that the definition of "modification" established under the 1974 PSD program would "continue[] to govern the application of new statutory NSR programs without the need for further rulemaking." UARG Petition at 9, *citing* CAA § 168(a); EPA Petition at 19 ("Congress specifically demonstrated [in CAA § 168(a)] its awareness and approval of the prior regulations . . . by mandating that most of the pre-existing regulations 'shall remain in effect' until implementation plans" were adopted.). UARG agrees

with EPA that, "at the very least," this establishes that excluding from NSR projects that are not NSPS modifications is "'a defensible construction' of the Act." EPA Petition at 19.

Finally, UARG agrees with EPA that granting certiorari in this case is important to the proper administration of one of the most important regulatory programs in this country. As EPA explains, the D.C. Circuit's bold (and erroneous) new approach to statutory construction in *New York II* "threatens to put EPA into a regulatory straightjacket that Congress did not intend," with "few if any options to tailor the program to changing conditions and policies" in order to "achieve environmental benefits." EPA Petition at 21. If not reversed, EPA continues, *New York II* will impede its "ability to address those problems in the future." *Id.* at 23; *see also* UARG Petition at 19. That both the regulator and the regulated community agree as to the importance of the case underscores the need for this Court to exercise its supervisory power.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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